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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~312.~~ 53

J. M. PETTIGREW, SURVIVING PARTNER OF EDMUNDS AND PETTIGREW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED NOVEMBER 17, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 312.

J. M. PETTIGREW, SURVIVING PARTNER OF EDMUNDS AND PETTIGREW, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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1 In the circuit court of the United States for the sixth circuit, district of West Tennessee, November term, 1871.

The United States of America, by M. E. Hudson, their attorney, complain of Cyrus W. Edmonds and James M. Pettigriew, who are in court by summons, of a plea of trespass on the case on promises, for that whereas hereto', to wit, on the fifth day of September, 1867, at the city of Memphis, in the district of West Tennessee, in consideration that the said United States of America, at the special instance and request of them, the said Cyrus W. Edmonds and James M. Pettigrew, would deliver the said Cyrus W. Edmonds and James M. Pettigrew divers goods and merchandize, to wit, ninety caddies and packages of manufactured tobacco, of great value, to wit, of the value of two thousand dollars of lawful money of the United States of America, to be sold and disposed of by the said Cyrus W. Edmonds and James M. Pettigrew for and on account of the said United States of America, for reasonable reward to them, the said Cyrus W. Edmonds and James M. Pettigrew, in that behalf, they, the said Cyrus W. Edmonds and James M. Pettigrew,
2 undertook and promiced them, *them* the said United States of America, to sell and dispose of the said goods, wares, and merchandize for the said United States of America, and to render a *time* and just account of the sale thereof the said United States of America, and of the moneys arising from such sale whenever after the sale of them, they, the said Cyrus W. Edmonds and James M. Pettigrew, should be thereunto requested. And although the said United States of America, confiding in the 'foresaid undertaking and promice of them, the said Cyrus W. Edmonds and James M. Pettigrew, did afterwards, to wit, on the fifth day of September, 1867, afor'said, at the city of Memphis, in the district aforesaid, deliver the said goods and merchandize to them, the said Cyrus W. Edmonds and James M. Pettigrew, for the purpose aforesaid; and although the said Cyrus W. Edmonds and James M. Pettigrew did afterward, to wit, on the tenth day of September, 1867, at the city of Memphis, in the district of West Tennessee aforesaid, sell and dispose of the said goods and merchandize for and on account of the said United States of America divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of two thousand dollars of like lawful money, and did then and there receive the same, and although after requested so to do, let they, the said Cyrus W. Edmonds and James M. Pettigrew, not regarding their said promice and undertaking in their behalf, have not rendered
3 to them, the said United States of America, a just and *time* or other account of the said sale of the said goods and merchandize, on any part thereof, or of the money arising from such sale or any part thereof, but they, the said Cyrus W. Edmonds and James M. Pettigrew, hitherto refused and still refuse so to do. And whereas also, to wit, on the fifth day of September, 1867, aforesaid, at the city of Memphis, in the district of West Tennessee aforesaid, in consideration that they, the said United States of America, at the like special instance and request of them, the said Cyrus W. Edmonds and James M. Pettigrew, had delivered to them, the said Cyrus W. Edmonds and James M. Pettigrew, divers other goods and chattle, to wit, ninety packages manufactured tobacco of great value, to wit, of the value of two thousand dollars of lawful money, to be sold and disposed of by them, the said Cyrus W. Edmonds and James M. Pettigrew, for them, the said United States of America, they, the said Cyrus W. Edmonds and James M. Pettigrew, undertook to render a just and reasonable ac-

count of the said last-mentioned goods and chattle to them, the said United States of America, whenever afterwards they, the said Cyrus W. Edmonds and James M. Pettigrew, should be thereto requested; and although they, the said Cyrus W. Edmonds and James M. Pettigrew, then and there had and received the last-mentioned goods and chalters of and from them, the said United States of America, for the purpose of last 'for'said, let they, the said Cyrus W. Edmonds
4 and James M. Pettigrew, not regarding their said undertaking and promice, have not rendered to the said United States of America a just and reasonable or other account of the said last-mentioned goods and chattles or any part thereof; but they, the said Cyrus W. Edmonds and James M. Pettigrew, have hitherto wholey refused and still wholey refuses so to do. And whereas also they, the said Cyrus W. Edmounds and James M. Pettigrew, on the tenth day of September, 1867, at the district of West Tennessee, was indepted to the United States of America, in the further sum of two thousand dollars, of like lawful money, for so much money by them, the said Cyrus W. Edmonds and James M. Pettigrew, before that time had and received to and for the use of them, the said United States of America, and being so indepted they, the said Cyrus W. Edmounds and James M. Pettigrew, in consideration thereof, afterwards, to wit, on the day and year last tofor'said, in the district afordsaid, undertook and than and thare faithfully promiced them, the said United States of America, to pay them the last-mentioned sum of money when they, the said Cyrus W. Edmonds and James M. Pettigrew, should be thereunto a'terwards requested. Nevertheless they, the said Cyrus W. Edmonds and James M. Pettigrew, not regarding their said promices and undertaking, have not as yet paid the said several sums of money, or any or either of them, or any part thereof, to them, the said United States of
5 America, although often requested so to do. But they, the said Cyrus W. Edmonds and James M. Pettigrew, to pay them the same have hitherto wholey neglected and refused, and still do neglect and refuse, to the damage of them, the said United States of America, of two hundred and fifty dollars ($250); and therefore they bring their suit, &co.

H. E. HUDSON,
U. S. Attorney.

(Endorsed:) No. 3, 1191. Circuit court the United States. Cyrus W. Edmonds and James M. Pettigrew. Declaration. Filed Feb'y 15th, 1872. H. E. Andrews, C.; S. S. Garrett, D. C.

6 The President of the United States to the marshal of the district of West Tennessee, greeting:

You are hereby commanded to summon Cyrus W. Edmonds and James M. Pettigrew, partners, under the firm-name and style of Edmonds, Pettigrew & Co., citizen' of the State of Tennessee, if they be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit, for the district of West Tennessee, at Memphis, on the 4th Monday in November next, and then and there to answer the United States of America of a plea of tresspass on the case upon promises, to the damage of the said United States of America of two thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme

Court of the United States, and the seal of said circuit court, at Memphis, the 4th Monday of May, 1871.

[L. S.] H. E. ANDREWS, *Clerk.*

7 E. 105. No. 1191. The United States vs. Edmonds, Pettigrew & Co. Summons.

Issued 4th day of November, 1871.

H. E. ANDREWS, *Clerk.*

Executed on James M. Pettigrew Nov. 7, '71, by making known to him the contents of this writ. After diligent search Cyrus W. Edmonds not to be found in my district.

L. B. EATON, *U. S. M.*
S. J. ATLEE, *Dep.*
H. E. HUDSON,
Attorney for the United States.

Serv., 2.00; mil., .12—$2.12.

8 The President of the United States to the marshal of the district of West Tennessee, greeting:

You are hereby commanded to summon Cyrus W. Edmonds and James M. Pettigrew, partners, under the name, firm, & style of Edmonds, Pettigrew & Co., citizens of the State of Tennessee, if they be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit for the district of West Tennessee, at Memphis, on the 4 Monday in May next, and then and there to answer the United States of America of a plea of trespass on the case upon promises, to the damage of the said United States of America of two thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 4 Monday in Nov'r, in the year 1871, and of the Independence of the United State the ninety-six'.

[L. S.] H. E. ANDREWS, *Clerk.*
S. J. GARRETT, *Dep. Clk.*

9 (Indorsed:) E. 105. No. 1191. The United States vs. Edmonds, Pettigrew. Alias summons.

Serve on C. W. Edmonds. Pettigrew has been served.

Clk.

Issued 15 day of Feb'y, 1872.

H. E. ANDREWS, *Clerk.*
S. S. GARRETT, *D. C.*

Executed Febr. 26th, 1872, by making the contents of this summons known to A. N. Edmonds.

L. B. EATON, *U. S. M.*
S. J. ATLEE, *Dep.*
H. E. HUDSON,
U. S. Attorney.

Serv., 2.00 mil., .12—$2.12.

10 In the circuit court of the United States for the sixth district of West Tennessee.

UNITED STATES OF AMERICA
vs.
CYRUS W. EDMONDS AND JAMES M. PETTIGREW.

The defendants, Cyrus W. Edmonds and James M. Pettigrew, now come and say that the first count of the plaintiffs' declaration heretofore filed herein is not sufficient in law—

1. Because the first count does not show that the said defendants, or either of them, were bonded officers of the Government of the United States for the reception, sale, or disposal of tobacco.

2. The said first count of the said declaration fails to show that the said defendants, or either of them, were officers of the Government of the United States and as such had the right to receive for custody, sale, or disposition the tobacco in the said first count mentioned.

3. That the said first count fails to show any contract or agreement or undertaking by the said defendants in the premises on which they can be held, or on which they are liable to the said plaintiffs.

Wherefore, &c.

T. W. BROWN,
For Defendants.

To the second count of said declaration the defendants, Cyrus W. Edmonds and James M. Pettigrew, now come and say that the said second of the plaintiffs' declaration is not sufficient in law: Because—

1. The said second count does not show that the said defendants, or either of them, were bonded officers of the Government of the United States for the reception, sale, or disposal of tobacco.

2. The said second count of the said declaration fails to show that the said defendants, or either of them, were officers of the Gov-
11 ernment of the United States and as such had the right to receive for custody, sale, or disposition of the tobacco in the said second count mentioned.

3. That the said second count fails to show any contract or agreement or undertaking, by the said defendants, in the premises on which they can be held, or on which they are liable to the said plaintiffs.

Wherefore, &c.

T. W. BROWN.
For Defendants.

And as to the third count in the plaintiffs' declaration pleaded, the defendants say that the same is not sufficient in law: Because—

1. The said third count is contradictory of the two preceding counts and inconsistent therewith.

2. The said third count fails to show how the said defendants became indebted to the said plaintiffs.

3. The said third count fails to show that the said defendants, or either of them, were officers of the Government of the United States, authorized to receive any mon*ies* or values for their use, or that they, or either of them, ever contracted with the United States, whereby they became indebted to the same in any amount whatsoever.

Wherefore, &c.

T. W. BROWN,
For Def'ts.

(Endorsed:) 1191. U. S. vs. Edmonds, Pettigrew & Co. Demurrer. Filed June 3rd, 1872.

12 Proceedings had in the circuit court of the United States for the district of West Tennessee at a regular term of said court begun and held for its November term A. D. 1872, at the Federal court-rooms, in the city of Memphis in said district Feb. 8th, 1873.

UNITED STATES
vs. } 1191. Law docket.
EDMONDS & PETTIGREW.

This cause coming on to be heard, the plaintiff, by the district attorney, asked leave to amend his declaration herein, which was granted, and the amended declaration filed accordingly; and the defendants are hereby ordered to plead or demur to the same during the present term.

13 In the circuit court of the United States for the sixth district of West Tennessee. Term 1872.

The United States of America, by H. E. Hudson, their attorney, complain of Cyrus W. Edmunds and James M. Pettigrew, sued as Edmunds, Pettigrew and Company, who are in court by summonds of a plea of trespass on the case of promices, for that heretofor', to wit, on the fifth day of September, 1867, at the district aforesaid, one Ralf S. Sanders, esq., then and there collector of internal revenue for the said United States within and for the eighth collection-district of the State of Tennessee, did seize as forfe'ted to the United States a large amount of manufactured tobacco, to wit, namely, ninety caddies of manufactured tobacco of great value, to wit, of the value of two thousand dollars, which tobacco was seized and found in the possession of them, the said defendants, Edmunds, Pettigrew and Co., and held by him as forfeited to the said United States, because the tax upon the same had not been paid to the United States, and because the said caddies were marked or branded with a certain false, counterfeit, and fraudulent inspection, mark, a brand to indicate that the same had been
14 properly and legally inspected by the proper inspecting officer of the said United States; all of which they, the said defendants, were then and there informed of and well knew. That, therefore, the said tobacco being so seized as aforesaid, but they, the said defendants, being so informed of the cause of said seizure, and well knowing the same, the said Rolf S. Saunders, esq., collector of internal revenue aforesaid, unlawfully and without the authority of the plaintiffs, undertook, and did then and there enter into with them, the said defendants, the following unlawful contract, and did then and there undertake to bind them, the said plaintiffs, to the same in substance, to wit: That the said defendants should receive said tobacco and sell the same, and out of the proceeds thereof, after deducting reasonable expenses and commissions, they, the said defendants, were to pay the same into court on account of them, the said plaintiffs, or to be to them should said court determine that said tobacco was subject to forfeiture, and was forfeited to the said United States as aforesaid; that therefore they, the
15 said defendants, did receive and sell said tobacco under the aforesaid unlawful and unauthorized agreement, and received a large sum of money therefor, to wit, the sum of two thousand doll's; that therefore the said defendants became indebted to the said plaintiffs in the sum of two thousand dollars, the value of said tobacco as aforesaid,

which they undertook and promised then and there to pay to the said plaintiffs, but which, although often requested, have not yet paid and wholly refuse so to do. And whereas also, heretofore, to wit, on the 5th day of September, 1867, aforesaid, at the district aforesaid, one Rolf S. Saunders, esq., collector of internal revenue for the said United States within and for the eighth collection district of Tennessee, did seize and take into his possession certain manufactured tobacco, to wit, ninety caddies of manufactured tobacco, which had become forfeited to the United States for a violation of the laws of the said United States for and on account of the manufacture, sale, and removal of manufactured tobacco; that they, the said defendants, were then and there informed of said seiz-
16 ure and forfeiture, and well knew the same, and being so informed, well knowing the same, did unlawfully and without proper authority of the said plaintiffs, receive said forfeited tobacco from the said Rolf S. Sanders, esq., collector aforesaid, upon pretence of selling, and disposing of the same; that the said defendants, after so unlawfully receiving said tobacco under said unlawful pretence, did unlawfully sell and deliver the same to divers persons, to plaintiffs unknown, and the said carried off and consumed, without the consent of said plaintiffs, and did receive a large sum of money for the same, to wit, the sum of two thousand dollars; that therefore the said defendants became and were indebted to the plaintiffs in said sum which they promised to pay to the said plaintiffs whenever they should be requested; and although they, the said defendants, have received said sum of money, and promised to pay the same, yet they, the said defendants, not regarding their said promise in this respect, although often requested to do so, have not paid said sum of money to said plaint-
17 iffs, but hitherto have wholly neglected and refused so to do, and still wholly refuse so to do. And when, also, they, the said defendants, on the 10th day of Sept'r, 1867, at the district of West Tennessee, were indebted to the United States in the further sum of two thousand dollars for so much money by them, the defendants, before that time had not received to and for the use of them, the said plaintiffs, and being so indebted, they, the said defendants, in consideration thereof, afterwards, on the day and year aforesaid, in the district aforesaid, undertook and *and* then and there faithfully promised the said plaintiffs to pay said sum of money when the defendants should be thereunto afterwards requested; nevertheless, not regarding their said promise in the premises, have not as yet paid said sum of money or any part thereof to them, the said plaintiffs, although often requested so to do, but have hitherto wholly neglected and refused to pay the same, and still neglect and refuse so to do to the damage of them, the said United States, of two hundred and fifty dollars; and therefore they bring their suit.

H. E. HUDSON,
U. S. Attorney.

18 (Endorsed:) No. 6, No. 1191. Circuit court. The United States Edmunds & Pettigrew. Amended declaration. Filed Feb'y 8th, 1873. H. E. Andrews, clerk.

19 In the circuit court of the United States for the sixth circuit and district of West Tennessee.

UNITED STATES OF AMERICA }
vs.
EDMONDS, PETTIGREW & CO. }

The defendants demur to the first court of pl'tiff's amended dec-

laration and says that the same is insufficient, and for causes of said demurrer, assigns as follows:

1st. The said count avers that the contract on which it is sought to charge the defendants was illegal and without authority of the plaintiff, wherefore the plaintiff cannot recover thereon, there being no subsequent assent thereto averred.

2nd. The said first count avers that the condition on which the defendants were to pay the money into court under the contract on which plaintiff seeks to charge them was as follows, to wit: that said count should determine that the tobacco mentioned in the declaration and referred to in the contract set up was subject to forfeiture and was forfeited to the United States and that said count fails to aver that
20 the said court ever so decided, or even that the said tobacco was subject to forfeiture.

3rd. The said first count is wholly bad and insufficient.

T. W. BROWN, *for Def'ts.*

The defendants likewise demur to the second count of the amended declaration, and say that the same is insufficient for causes of arrising as follows, to wit:

1st. The said count admits that the tobacco seized was received from the revenue officer with his consent, or fails to aver that it was not so received, and with his consent was received for the express purpose and with the view of selling and delivering the same to these persons. Yet the plaintiff alleges that this contract with the said revenue officer was illegal and without authority of the plaintiff, and fails to aver that the plaintiff ever consented to it; for which reason the plaintiff cannot recover the proceeds of the sale of said tobacco as on a contract.

2nd. The said second count is wholly insufficient to charge the defendants as on a tortious conversion, because the same fails to aver that it had ever been adjudicated in any proceedings; that the alleged seizure by the revenue officer of the said tobacco was proper, or that the
21 same was ever adjudged as forfeited for violation of revenue law, or for any other cause, the mere seizure by the officer, without subsequent adjudication of his right to seize, & condemnation of the tobacco being utterly insufficient to charge the defendants, or for a conversion; for which reason the plaintiff cannot recover on the said count as for a tortious conversion.

3rd. The said count fails to aver that it was any part of the contract with the collector that defendants were to account for the proceeds of sale, and said count seeks to charge on an implied contract (if not for a tortious conversion), which cannot arise unless it be a fact that the said tobacco was subsequently adjudicated as having been properly seized and forfeited, which is not averred.

4th. The said second count blends contract and tort, which cannot be done.

5th. The said second count is wholly insufficient.

T. W. BROWN,
For Defendants.

The defendants demur to the third count in the plaintiffs'
22 amended declaration, and say that they ought not to be charged thereon, and for causes of demurrer assign as follows, to wit:

1st. Said count fails to allege how or in what manner the defendants became indebted to the plaintiffs. The law prescribing how and in what way government shall contract, there can be no indebtedness

created as of course by the private citizen, even with the government, except by express contract under the law.

2nd. The said count fails to allege that the defendants were officers of the government; and without this no liability as of contract can accrue by implication against the defendants and in favor of the plaintiffs.

3rd. The said third count does not charge a tort.

4th. The said third count is wholly insufficient.

T. W. BROWN, *for Def'ts.*

The said amended declaration is insufficient, because the same unites counts in tort with counts in conversion.

Whereupon, &c.

T. W. BROWN, *for Def'ts.*

(Endorsed:) 1191. U. S. vs. Edmunds & Pettigrew. Demurrer to amended declaration. Filed March 12, 1875. H. E. Andrews, cl'k. T. W. Brown.

23 In the circuit court of the United States for sixth circuit, district of West Tennessee.

1. The defendants, for plea herein, say that they are not indebted to the plaintiff, and did not promise or undertake to pay plaintiff as in the manner and form set out in plaintiff's amended declaration, And of this they put themselves on the country, &c.

T. W. BROWN, *for Def'ts.*

2. The defendants, for further plea herein, say that they are not guilty of the conversion as in manner and form set out in plaintiff's amended declaration; & of this, &c.

T. W. BROWN, *for Def'ts.*

3. For further plea herein the defendants say that one Relf Sanders, at the time collector of revenue for the pl'ff at Memphis, did at one time set up some claim or demand against certain caddies of tobacco then in possession of the defendants as consignees of a firm of tobacco manufacturers then doing business in S't Louis, to wit, Glasier, Luko & Co., for whom the defendants held the said tobacco for sale on commission for and on account of the said Glasier, Luko & Co., as their agents, in due course of commerce, and not otherwise. The claim set up by said Sanders to the said tobacco was for and on account of some violation of the revenue law by the said Glasier, Luko & Co. before the shipment of the said tobacco to the defendants aforesaid. Whether there really had been any violation of the revenue law in regard to the said tobacco the defendants did not then nor do they now know. The defendants
24 say that there was no seizure of the said tobacco, that the same was not subject to seizure, and that no proceedings were institu'ed against the said tobacco. They say that everything they did in the premises was done by the direction and with the consent of plaintiff's agent, the said Relf Sanders, and without solicitation or request on their part, and without fraud on the plaintiffs. The defendants were directed to sell the said tobacco, the reason for which direction, as assigned at the time by pl'ffs agent, s'd Sanders, was that if the tobacco was retained until termination of suit it would be worthless, and he directed the proceeds to be held by defendants to await the determination of

proceedings against the tobacco. And the plaintiff did fail to proceed against the said tobacco and abandoned any attempt to pursue the same for alleged violation of the revenue law, but nevertheless they had ample opportunity of obtaining from def'ts the proceeds of the sales of said tobacco, which defendants held for a long time, to wit, from day of to day of , in order that the plaintiff might sue for the same and establish any right thereto in the premises. And the said plaintiff did sue for the said proceeds, and finally abandoned and dismissed the said suit after plea filed, not notifying the defendants that the plaintiff intended to seek further the said fund. Whereupon the defendants paid over to their consignors, the said Glasier, Luko & Co., the proceeds of sale, as they were bound to do. And this is the same tobacco referred to in the amended declaration of plaintiffs.

T. W. BROWN, *for Def'ts.*

For further plea in this behalf the defendants say that the same matters and things set up in the plaintiff's amended declaration here are before came in suit between the plaintiff and defendants in this
25 court, and there was a determination thereof against the said plaintiff and in favor of the defendants; and the defendants tender for inspection to the court the record of the said suit, &c.

T. W. BROWN, *for Def'ts.*

(Endorsed:) 1191. The U. S. vs. Edmonds, Pettigrew & Co. Pleas. Filed M'ch 16th, 1875. H. E. Andrews, cl'k.

In the circuit court of the United States, in and for the sixth circuit thereof, district of West Tennessee, Nov. term, 1874.

THE UNITED STATES
vs.
EDMONDS, PETTIGREW & CO. } No. 1191. L.

The plaintiff, by their attorney, for replication to the first and second plea of the defendants by them above pleaded, and whereof they have put themselves upon the country, doth the like.

W. W. MURRAY,
U. S. Attorney.

(Endorsed:) No. 1191. L. The United States vs. Edmunds, Pettigrew & Co. Replication to 1st & 2nd pleas. Filed, March 19th, 1875. H. E. Andrews, cl'k. L. H. Pillsbury, D. C.

26 THE UNITED STATES
vs.
EDMUNDS, PETIGREW & CO.

And the said plaintiffs, as to the third plea of the said defendants by them thirdly above pleaded, say that the same, and the matters therein contained in the manner and form as the same are above pleaded and set forth, are insufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against said defendants. And that the said plaintiffs are not bound by law to answer the same. And this the plaintiffs are ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiffs pray judgment & their damages, &c.

W. W. MURRAY,
U. S. Attorney.

(Endorsed:) No. 1191. The United States vs. Edmunds, Petigrew & Co. Demurrer to 3rd plea. Filed M'ch 22nd, 1875. H. E. Andrews, cl'k. L. H. Pillsbury, D. C.

UNITED STATES OF AMERICA,
District of West Tennessee:

THE UNITED STATES
vs.
EDMONDS, PETTIGREW & Co. } 1191. Law.

And as to the said third plea of the said defendants by them hereinabove pleaded, whereof they put themselves upon the country, the district attorney, on behalf of the United States, doth the like.

W. W. MURRAY,
U. S. Attorney.

(Endorsed:) 1191. L. The United States vs. Edmonds, Pettigrew & Co. Replication to third plea. Filed March 23, 1875. H. E. Andrews, cl'k. L. H. Pillsbury, D. C.

27 The President of the United States to the marshal of the district of West Tennessee, greeting:

You are hereby commanded to summon Cyrus W. Edmonds, a partner of the firm of Edmonds, Pettigrew & Co., a citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit for the district of West Tennessee, at Memphis, on the 1st Monday in March next, and then and there to answer the United States of America of a plea, to the damage of said plaintiffs (as they say) two thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, the 27th day of February, 1875.

[L. S.] HORACE E. ANDREWS, *Clerk.*

28 (Indorsed:) No. 1191. The United States vs. Cyrus W. Edmonds. Pluris summons.

Issued 27th day of January, 1875.

H. E. ANDREWS, *Clerk.*

Executed by making known the contents hereof to Cyrus W. Edmonds M'ch 1st, 1875.

Serv., 2.00; mile. .24—2.24.

L. B. EATON, *U. S. M.*
W. KOCH, *Deputy.*
W. W. MURRAY,
U. S. Attorney.

Ret'd & filed M'ch 1st, 1875.

H. E. ANDREWS, *Clk.*

29 In the circuit court of the United States for the district of West Tennessee.

Proceedings had at a regular term of said court begun and held for its November term, A. D. 1874, at the Federal court-room, in the city of Memphis, March 12, A. D. 1875.

UNITED STATES
vs. } 1191.
EDMUNDS & PETTIGREW.

Be it remembered that upon this 12th day of March, anno Domini 1875, came on this cause to be heard upon the defendants' demurrer to the amended declaration filed herein, it being agreed by the plaintiffs' attorney that the defendants' demurrer to the original declaration herein is well taken.

After hearing the argument of counsel, the court is of the opinion that the defendants' demurrer to the plaintiffs' amended declaration is not well taken, and doth overrule and disallow the same. It is further considered by the court that the plaintiffs recover of the defendants the costs incident to their said demurrer to plaintiffs' amended declaration, for which let execution issue.

30 Proceedings had at a subsequent day of said term of said court adjourned to this 15th day of March, A. D. 1875.

THE UNITED STATES
vs. } 1191.
EDMONDS & PETTIGREW.

In this cause the plaintiffs' attorney moved the court for permission to amend their amended declaration herein, so as to have it aver that the ninety caddies of tobacco became and was forfeited to the United States; which motion was allowed by the court, and the amendment made.

Proceedings had at a subsequent day of our said court, adjourned up to March 23rd, A. D. 1875.

UNITED STATES
vs. } 1191. Assumpsit.
EDMUNDS, PETTIGREW & Co.

Came the district attorney and came also the defendants, by attorney, when this cause came on to be heard upon the demurrer filed herein to the defendants' 3rd plea filed herein on the 16th of March, 1875,
31 and the same being heard and understood by the court, is hereby overruled and disallowed, with leave to the United States to plead thereto; which is accordingly done.

Thereupon the death of the defendant, Cyrus W. Edmonds, was suggested and proven, and the said suit ordered to be revived against James M. Pettigrew, as the surviving partner of the firm of Edmonds, Pettigrew & Co.

Thereupon, to try the issues joined herein, came a jury of good and lawful men, to wit, H. K. Alexander, J. G. Smith, A. T. Shaw, John Cowden, James Elder, W. C. Adams, H. Harmon, J. W. Tarkington, F.

M. Cude, W'm Humphrey, W'm Richards, J. M. Reavis, who, being duly elected, tried, and sworn well and truly to try the issues herein, and a true verdict render, on their oaths say (after hearing the testimony, listening to the argument of counsel, and receiving the charge of the court in relation to the law of the case) that they find the said defendant indebted to the United States in the sum of one thousand three hundred and fifty-four dollars and thirty-five cents ($1,354.35). Whereupon the said defendant moves the court for a new trial herein; which motion is reserved by the court for future hearing.

32 Proceedings had in the circuit court of the United States at a subsequent day of said term of our said court, to wit, on the 12th day of April, A. D. 1875.

UNITED STATES
vs. } 1191.
EDMONDS & PETTIGREW.

This day comes on to be heard the motion for a new trial herein, which motion, being heard and fully understood by the court, is hereby disallowed and overruled; and thereupon the district attorney moves the court for judgment upon the verdict rendered herein on the 23rd day of March last; and in consideration of said verdict it is considered by the court that the United States have and recover of and from the said defendant, James M. Pettigrew, surviving partner of said firm of Edmonds, Pettigrew & Co., the sum of ($1,354.35) thirteen hundred and fifty-four $\frac{35}{100}$ dollars, the amount of said verdict, for which let execution issue, and for the costs of this suit which are also adjudged against said defendant.

33 UNITED STATES OF AMERICA,
District of West Tennessee:

In the U. S. circuit court for said district of West Tennessee.

THE UNITED STATES
vs. }
EDMONDS, PETTIGREW & Co.

Be it remembered that on the trial of this cause the plaintiffs introduced evidence tending to prove that on the day of September 1867, there was found in the possession of the defendants ninety caddies of manufactured tobacco, and that the stamps and brands on the same were counterfeit; that said tobacco was immediately seized as forfeited to the United States, by one Saunders, then collector of internal revenue, and that by an agreement between said defendants and said Saunders said tobacco was sold for the sum of $935.00 net, which amount defendants agreed to hold for the plaintiffs subject to the order of the U. S. court on condemnation of said tobacco. It is agreed that no proceeding was ever instituted in rem for the condemnation of said tobacco. The defendants introduced evidence tending to prove that they sold said tobacco, at the direction of said Saunders, and that they held said tobacco at the time of said seizure as consignees, and for sale on commission, and that they knew nothing whatever in regard to the stamps and brands on said tobacco being counterfeit; that said tobacco was manufactured at S't Louis, Missouri, and sent to them at Memphis,

Tennessee, by their consignors, Glasier, Leucho & Co., and that they were not guilty of any wrong in connection with the manufacture and stamping of said tobacco; that on the first day of October, 1867, plaintiffs commenced a suit against them for the proceeds of said tobacco in the circuit court of the United States at Memphis, Tennessee, and that after plea had been filed in said cause, the plaintiffs, by their attorney, dismissed said suit, and that defendants held the proceeds of
34 said tobacco until the day of April, 1871, when they paid over the same in good faith to the attorney of their consignors; that they had no notice of the fact that plaintiffs intended to commence another suit against them for the proceeds of said tobacco at the time they paid over the same to said attorney; that the defence of the first suit was made by said Glasier, Leucho & Co. at their own expense, and not at the instance of defendants; that the reason why said collector directed the tobacco to be sold, as assigned by him at the time, was that if kept until termination of proceedings to condemn it would be worthless, and that such would have been the fact; that the said collector directed them to hold the proceeds subject to a condemnation of the tobacco, which condemnation he represented that he would at once attempt to procure.

(Defendants objected to the introduction of any evidence touching the guilt of the tobacco, which objection the court overruled and admitted the evidence to the jury; to which action of the court the defendants did then except. And this was all the evidence.)

The defendant asked the court to charge the jury as follows:

First. That the plaintiffs, having failed to proceed against the tobacco in rem for the alleged violation of the internal-revenue law, *that* they cannot recover in this suit.

Second. That if the jury find that the plaintiffs, on the 1st day of October, 1867, commenced a suit against the defendants for the proceeds of the tobacco in controversy, and on the day of April, 1868, dismissed said suit, and before the commencement of this suit defendants paid the proceeds of said tobacco over to the attorney of their consignor without notice & in good faith, & without believing, or having from facts good reason to believe, that the plaintiffs intended to *to* commence this action against them, that in *that* event they must find for the defendants.

Which instructions the court refused to give, and the defendants excepted.

The court charged the jury that if they believed the tobacco
35 caddies had upon them counterfeit stamps or brands, that such fact forfeited it to the government.

And if the proper officer seized it as forfeited, and the defendants sold the same by direction of the officer seizing it, and received the money, and had not paid it, or any part thereof, to the government, they remained liable for the amount so received by them, and they should find a verdict for the plaintiffs.

To which charge the defendants excepted.

H. H. EMMONS,
Cir't Judge.

(Endorsed:) No. 1191. L. The United States vs. Edmunds, Pettigrew & Co. Bill of exceptions. Filed April 17th, 1875. H. E. Andrews, clerk.

THE UNITED STATES OF AMERICA.

The President of the United States of America to the judges of the circuit court of the United States for the 6th judicial circuit and western district of Tennessee, greeting:

Because in the record & proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between the United States, plaintiffs, & Edmonds, Pettigrew, & Co., defendants, a manifest error hath happened, to the great damage of said Edmunds, Pettigrew, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all
36 things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 6th day, being the first Monday, of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right & according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court, this 8th day of May, 1875.

[SEAL.] HORACE E. ANDREWS,
Clerk Circuit Court of the United States
for the District of West Tennessee.

(Indorsed:) 1191. Law. United States vs. Edmonds & Pettigrew.

37 Circuit court of the United States for district of West Tennessee.

THE UNITED STATES
vs.
J. M. PETTIGREW, SURVIVING PARTNER OF THE firm of Edmunds & Pettigrew. } Appeal bond to U. S. Supreme Court.

Know all men by these presents that we, J. M. Pettigrew, as principal, & C. W. Edmunds and T. W. Brown, as sureties, are held and firmly bound unto the United States in the sum of two thousand seven hundred and eight dollars and seventy cents, good and lawful money of the United States, well and truly to be paid to the said United States, to which payment we jointly and severally bind ourselves, our joint & several heirs, executors, and administrators, firmly by these presents, signed with our hands and sealed with our seals, this 6th day of May, 1875.

The condition of the above obligation is such, that whereas in the circuit court of the United States for the sixth judicial circuit and district of West Tennessee the above-named J. M. Pettigrew hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered by the above-named circuit court in the cause of the United States vs. Edmunds and Pettigrew:

38 Now, therefore, if the above-named J. M. Pettigrew shall prosecute his said writ of error to effect, and answer all costs and damages if *it* shall fail to make good *its* plea, then this obligation shall be void; otherwise to remain in full force and virtue.

J. M. PETTIGREW, [SEAL.]
By C. W. EDMUNDS.
C. W. EDMUNDS. [SEAL.]
T. W. BROWN. [SEAL.]

Personally came before me C. W. Edmunds, who, being by me duly sworn, states that he is worth the sum of three thousand dollars in unincumbered real estate in the district of West Tennessee, which is not exempt from execution and is liable to the said process.

C. W. EDMUNDS.

Subscribed and sworn to before me this 6th day of May, 1875.

L. H. PILLSBURY,
U. S. Com'r, D. W. Tenn.

Approved May 6, 1875.

H. E. ANDREWS, *Clerk.*

(Endorsed:) The United States vs. J. M. Pettigrew, surviving partner of the firm of Edmunds & Pettigrew. Filed May 6th, 1875. H. E. Andrews, clerk.

38½ Proceedings had at a subsequent day and term of our said court, to wit, on the 20th day of April, A. D. 1875, at the Federal court-rooms in Memphis, Tenn.

UNITED STATES
vs. } 1191.
EDMONDS & PETTIGREW.

In this cause the defendant comes and presents his bill of exceptions in this cause, which is signed by the court and ordered to be filed by the court and made a part of the record in this cause, and the same is accordingly done.

39 THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee:

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the records & proceedings in said court as the same now appear of record and upon the files in my office, in the following cause, to wit, The United States vs. Edmonds & Pettigrew.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office, in the city of Memphis, this 8th day of May, A. D. 1875, and of the Independence of the United States the 99 year.

[SEAL.]

H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

(Endorsed:) No. 1191. Circuit court of the United States, district of West Tennessee. The United States vs. Edmonds & Pettigrew. Transcript. Fee, $12.00.

(Endorsement on cover:) No. 312. J. M. Pettigrew, surviving partner of Edmunds & Pettigrew, plaintiff in error, vs. The United States. W. Tennessee C. C. U. S. Filed 17th November, 1875.

In the Supreme Court of the United States.

JAMES M. PETTIGREW,

SURVIVING PARTNER, &C.,

PLAINTIFF IN ERROR,

vs

UNITED STATES

DEFENDANT IN ERROR.

WRIT OF ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR WESTERN DISTRICT OF TENNESSEE, AT MEMPHIS

BRIEF AND ARGUMENT OF T. W. BROWN,

OF COUNSEL FOR PLAINTIFF IN ERROR.

MEMPHIS, TENN.
Price, Jones & Co., Printers and Binders, 12 Jefferson St.
1878.

IN THE SUPREME COURT OF THE UNITED STATES.

JAMES M. PETTIGREW,
SURVIVING PARTNER, &c.,
Plaintiff in Error,
vs.
UNITED STATES,
Defendant in Error.

WRIT OF ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE, AT MEMPHIS.

Brief and Argument of T. W. BROWN, for Plaintiff in Error.

The learned circuit Judge, in disposing of this case, admitted that the results of his rulings were hard on the appellant, and that these rulings did not accord with *abstract* justice. He, however, felt constrained to them by the technical principle laid down in some of the cases, that the property to which guilt, *in fact*, attaches, becomes *eo instanti*, the property of the Government, though no proceedings are successfully prosecuted for condemnation. He concieved that such proceedings were merely the methods of establishing or proving a title already existing, and not the creator of a title.

Suppose, for the sake of argument, that he was correct in this view, it is submitted that his application of this principle to the predicament of fact in this record, is not sustained by the analogies or doctrines of law, by the instincts of justice, or a sound policy.

In the case of *purchase* from the parties, directly or intermediately, whose violations of law have affixed guilt to the property, it may be right, and under the compulsion of a necessary policy, that the taint shall follow the property even into the hands of an innocent purchaser, without notice, in order that the title of the Government may not fail. Further than this, no case can be strained. The instance of an ordinary commercial factor, or even a common bailee, cannot be placed within the reason of such a rule—

First. By returning the property or accounting for it to his consignor or principal in the discharge of his trust, he is not asserting a title *adverse* to the Government, as in the case of a purchaser.

Second. It is not removing the property or its proceeds from the reach of the Government, as is the case of a purchaser.

In these distinctions rest, it is respectfully submitted, the difference between the dealings of a purchaser and the transactions between consignee and consignor, and bailee and bailor, agent and principal.

If the consignee returns the property or its proceeds or so deals with it in bad faith toward the Government, with the view or for the purpose of enabling the guilty consignor to defeat the forfeiture, secure the values of the property, hide it from the Government or embarrass or delay the latter in appropriating it, then the consignee becomes liable. His liability does not in such an event stand on the doctrine or principle involved in the case of a purchaser without notice, but on the ground that by collusion with the guilty parties he is in equal guilt with the offenders against the law.

Would it be entertained for a moment that the Government could hold factors, who have without knowledge and without fraud sold and paid over the proceeds of sale to their consignors in the ordinary course of commercial correspondence, liable for the value of the property by proving in action of assumpsit the guilt of the property so sold? It often happens that merchandise passes through a succession of factors before it disappears in general consumption or final purchase. If the principle applied in this case by the learned Judge obtains, the Government might recover for the guilty property from several factors. This would be an absurdity.

The case of the Government gains no strength in the way of exception from the instance just put by the fact that a seizure had been made in the hands of the factor. Whether that seizure was right or wrong the factor did not know and could not know. He did not resist the seizure, it not being his duty so to do. The Government of its own accord left the property with the factor, deeming it to *its* advantage not to change the possession. If the factor had then sold the tobacco without the instructions or consent of the Government he might have been liable for colluding with the offending consignors, or at least as meddling on *his own responsibility* with Government property. This was not done. The Government of *its own instance* asked the factor to sell the goods, owing to the liability of this sort of merchandise to depreciate in value, and to keep the proceeds of sale for payment into court when a judgment in condemnation should be obtained. To accommodate the Government the factor agreed so to do. It was to the advantage and profit of the Gov-

ernment that the merchandise should be sold as soon as possible. It could be sold for a greater sum by a factor in the ordinary course of his business than by the Marshal at a forced sale. This arrangement was in perfect accord with the spirit, though not the letter, of the proviso on p. 112, line 27, U. S. Statutes at Large, vol. 14, ch. 184, (1866). It was intended to meet the contingencies and secure the benefits of that provision of the act. The factor did his duty faithfully by the Government, sold the tobacco for a good price and held the proceeds *four* years to enable the Government to follow up the seizure by condemnation. No such condemnation was had by the Government, and none attempted after a first futile effort perhaps, for years before the factor paid over to his consignor, and none even up to this time. It is insisted:

First. That the Government by its long delay, as to all persons except the offending parties and those in collusion with them, must be held by this failure to proceed in condemnation *to have abandoned the seizure.*

Second. That the factor was entitled to a reasonably prompt prosecution by the Government for condemnation both by reason of the terms of his undertaking with the Government agents, as well as by reason of his trust relations to his consignor. The Government no more than a private individual could require the factor to expose himself to suit by his consignor, or to injury to his commercial reputation in the factorage business by an indefinite *retention* of trust funds in his hands. It cannot for a moment be considered that the factor under the conditions assigned him by the agents of Government could have paid over these funds to any person for the Government without incurring

liability to his consignor. If the Government failed to press a condemnation surely the factor could not urge the guilt of the tobacco against the demand of the shipper for proceeds of sale.

Third. The Government through its agents gave notice that a suit in condemnation would be prosecuted with reasonable promptness to establish the guilt of the tobacco, and that unless this was done the factor need not hold the proceeds of sale. This is the legal import of the transactions between the agents of the Government and the appellant. The Government has utterly failed to prosecute. The appellant acted in good faith on the very conditions prescribed by the Government. If loss has occurred it is by virtue of the laches of the Government. This laches was by the *law officers* of the Government, for the collector made seizure and gave information. The Government is bound by the laches of its *law* officers, just as an individual client is. The loss must fall on the Government, not on the appellant, who acted in the best of faith with it.

Wm. G. Brown

T. W. BROWN,

Of Counsel for Appellant.

In the Supreme Court of the United States.

JAMES M. PETTIGREW,

Surviving Partner of Edmonds, Pettigrew & Co.,

PLAINTIFF IN ERROR.

—vs.—

UNITED STATES,

DEFENDANTS IN ERROR.

Writ of Error to the Circuit Court of the United States for Western District of Tennessee, at Memphis.

BRIEF AND ARGUMENT OF

C. W. FRAZIER, BURCH & DUNCAN and T. W. BROWN,

For Plaintiff in Error.

PRINTED AT THE DAILY APPEAL BOOK AND JOB OFFICE,
MEMPHIS, TENN.

In Supreme Court of the United States.

JAMES M. PETTIGREW.
Surviving Partner of Edmonds, Pettigrew & Co., Pla'ntf in Error,
vs.
UNITED STATES,
Defts. in Error.

Writ of Error to Circuit Court of the United States for Western District of Tennessee, at Memphis.

ASSIGNMENT OF ERRORS.

Assignment of the errors relied on by plaintiff in error:

The Court erred in over-ruling the demurrer to the declaration shown at page 7, because the action could not be sustained without averring, in the declaration, that a proceeding in rem had been begun and prosecuted to final judgment of condemnation and forfeiture.

2d. The Court erred in overruling the objection of defendant below to the introduction of the testimony tending to prove the guilt of the tobacco, because that could only be proved by the introduction of a record showing a direct proceeding in rem against the tobacco for such violation of the revenue laws, and final judgment of condemnation thereon.

3d. The Court erred in refusing to charge the jury as requested in the following instructions:

First. "That the plaintiffs, having failed to proceed against the tobacco in rem for the alleged violation of the internal revenue laws, they cannot recover in this suit."

Second. "That if the jury find that the plaintiffs on the 1st day of October, 1867, commenced a suit against the defendant for the proceeds of the tobacco in controversy, and on the day of

April, 1868, dismissed said suit; and before the commencement of this suit defendants paid the proceeds of said tobacco over to the attorney of the consignor, without notice, and in good faith, and without believing or having, from facts, goods reasons to believe that the plaintiffs intended to commence this action against them; that in that event they must find for defendants." p. 13.

3d. The Court erred in giving the following instructions:

"The Court charged the jury that if they believed the tobacco caddies had upon them counterfeit stamps or brands, that such fact forfeited it to the Government.

"And if the proper officer seized it as forfeited, and the defendants sold the same by direction of the officer seizing it, and received the money, and had not paid it or any part thereof to the Government, they remained liable for the amount so received by them, and they should find a verdict for the plaintiffs."

This was error because the only competent evidence of these facts was a record of a judgment of condemnation against the tobacco upon a proceeding in rem.

C. W. FRAYSER and HUMES & POSTON,
Attorneys for Plaintiff in Error.

In Supreme Court of the United States.

JAMES M. PETTIGREW.
Surviving Partner of Edmonds, Pettigrew & Co., Pla'ntf in Error,
vs.
UNITED STATES,
Defts, in Error.

Writ of Error to Circuit Court of the United States for Western District of Tennessee, at Memphis.

BRIEF AND ARGUMENT OF C. W. FRAYSER AND HUMES & POSTON, for PLAINTIFF IN ERROR.

Two questions arise on this writ of error: First, under the internal-revenue act of March, 1866, ch. 184, can a forfeiture of tobacco, for violation of the provisions of that act, be effectuated by an action of assumpsit, not against the owners, but against consignees, commission merchants, for sale; or is not a proceeding in rem. against the offending tobacco or its proceeds, supported by a seizure on judicial process and notice to the owners, by either personal service or publication, the only remedy?

Secondly. If a collector seize, in the hands of a firm of commission merchants (consignees for sale), manufactured tobacco for a violation of said act, and by agreement leaves in the hands of said commission merchants the offending tobacco to be sold, and proceeds held subject to the order of the court on con-

demnation as forfeited; and if such proceeding is begun, and then dismissed and abandoned, and afterward the commission merchants, having held the proceeds for four years, pays it over to the owners under the honest belief that no proceedings to forfeit will be further attempted, are they liable to the Government in an action of assumpsit for the proceeds of the sale of this tobacco, and that without any proceedings to forfeit the tobacco previously prosecuted to final judgment of condemnation.

The questions are presented on the declaration and demurrers thereto, and also on the instructions asked by the plaintiffs in error and refused, as well as on the instructions given by the Court to the jury, and also on the admission of testimony over plaintiffs in error objection.

These questions are presented on the record as follows:

This is a writ of error to the Circuit Court of the United States for the Western District of Tennessee, to review a verdict and judgment obtained on the law side of said Court against the plaintiff in error in favor of the United States, on the 16th of March, 1875, for $1,354 34.

The action was in assumpsit begun by summons issued Nov. 4, 1871. The writ was served on James M. Pettigrew Nov. 7, 1871, and on C. W. Edmonds Feb. 15, 1872; the two defendants composed the firm of Edmonds, Pettigrew & Co., commission merchants and factors, doing business in Memphis.

The original declaration contained three counts. The first count averred that in consideration, that the United, at the request of defendant, would deliver to them 90 caddies of manufactured tobacco, worth $2,000, to be sold on account of the United States for a reasonable commission, the defendants agreed to sell the same and pay over the proceeds to the United States; that on the 7th Sept. plaintiff did deliver to defendants the tobacco; that

defendants sold it, received the proceeds, $2,000, and refused to pay them over.

Second count, that in consideration that the United States had delivered same tobacco to defendants, at their request, to be sold, the defendants agreed to account for and pay over the proceeds when sold; that defendants had sold same for $2,000, and failed and refused to pay over proceeds.

Third count, for money had and received for the use of the United States.

p. 1 and 2.

Defendants demurred to each of these three counts. p. 4.

The plaintiffs abandoned this declaration and filed an amended declaration. p. 5.

The first count of this amended declaration averred that R. S. Saunders, Collector of Internal Revenue for the United States, at Memphis, on Sept. 7, 1867, seized 90 caddies of manufactured tobacco worth $2,000, as forfeited to the United States because the tax upon the same had not been paid, and because the caddies had a counterfeit brand on them indicating legal inspection; that the same had been seized in possession of the defendants with knowledge on their part of the facts and cause of seizure; that Saunders entered into the following unlawfal contract with defendants, to-wit · that defendants should sell the tobacco, and after deducting reasonable compensation, pay the same into Court on account of the United States, or to be paid to the United States if the Court should determine that said tobacco was forfeited; that, therefore, defendants did receive and sell said tobacco under this illegal agreement and received $2,000 therefor; that hence defendants became indebted to plaintiffs $2,000 and have refused to pay it.

The second count, that on Sept. 5, 1867, said Saunders, Collector of Internal Revenue, seized twenty caddies of manufactured tobacco which had become forfeited to the United States for a violation of the laws of the United States for and on account of the manufacture, sale, and removal of manufactured tobacco; that defendants, well knowing the same, did, unlawfully and without proper authority, receive said forfeited tobacco from Saunders upon pretense of selling it, and did unlawfully sell it, and received therefor $2,000, therefore they became indebted and refused to pay. P. 6.

The third count is the common count for money had and received.

The defendants demurred to each of these counts and to the whole.

First ground of demurrer to the first and second counts, that they aver that the contracts between the Collector and defendants was illegal, and yet do not aver a subsequent assent by plaintiffs.

Second ground of demurer to first and second counts, that they do not aver any prior proceedings against the tobacco to have the tobacco adjudicated as forfeited for a violation of the revenue law; nor do they aver any prior adjudication by the Court condemning the tobacco as forfeited. That under the first count the averred condition on which defendants were to pay the money into Court was that the Court should previously determine the tobacco subject to forfeiture and forfeited to the United States; and under the second count there could be no conversion as against the United States without a previous judicial condemnation of the tobacco as forfeited. P. 7.

The ground assigned to whole declaration is joinder of contract and pure tort.

The Court overruled the demurrer and ordered defendants to plead over. P. 11,

Defendants filed four pleas: First. Non-assumpsit. Second. Not guilty. Third. That defendants were in possession of the tobacco as consignees of Glasier, Luko & Co., a firm of tobacco manufacturers doing business in St. Louis; that defendants held it for sale on commission on account of Glasier, Luko & Co. in due course of commerce, and not otherwise; that Saunders, then Collector of Internal Revenue of the United States at Memphis, set up a claim to the tobacco on account of some violation of the revenue laws by Glasier, Luko & Co. before its shipment to defendants? Whether there really had been any violation of the

revenue laws defendants did not then, nor do they now know. Defendants deny any seizure, or that the tobacco was subject to seizure, and aver, "no proceedings had been begun against the tobacco; they aver they acted by the direction and with the consent of R. S. Saunders, plaintiffs, and without solicitation or request by defendants and without fraud on plaintiffs. Defendants were directed to sell the tobacco because, as Saunders said at the time, if the tobacco was retained until the end of suit it would be worthless, and he directed the proceeds to be held by defendants to await the determination of proceadings against the tobacco. Defendants held the proceeds for four years in order that plaintiff might institute and end the contemplated proceedings; that plaintiffs did sue for the same and finally abandoned and dismissed said suit after plea filed, not notifying defendants that plaintiffs intended further to pursue said fund, whereupon defendants paid over to Glasier, Luko & Co. the proceeds of the sale of the tobacco, as they were bound to do. page 8 and 9.

Fourth. They plead the former suit and dismissal as res-adjudicata.

Replications and issues on all these pleas:

The case was submitted to a jury March 15, 1875, and resulted in verdict for plaintiffs against defendants in the sum of $1,354 35.

The motion for new trial was overruled.

The question presented by the defendants' demurrer to the declaration and by the first instruction asked by the defendants, at p. 13, is:

Whether any forfeiture could be shown, without introducing a record of a proceeding in rem., or in the nature of a proceeding in rem, condemning said tobacco or its proceeds, as forfeited by violation of the revenue laws.

Second. Whether the Court did not err in refusing to give the second instruction asked by defendants, at page 13.

The proof showed that the tobacco was manufactured at St. Louis, Missouri, by Glasier, Luko & Co., and stamped there; that

Glasier, Luko & Co. were the owners; that they shipped it to defendants at Memphis, for sale on commission, and defendants knew nothing whatever in regard to the stamps and brands on said tobacco being counterfeit; that after the seizure by Saunders, he left it with them, with direction to sell it, and an agreement that they should hold the proceeds subject to the order of the United States Court on condemnation of said tobacco; that Oct. 1, 1867, plaintiffs began suit vs. defendants for the proceeds of said tobacco in the United States Circuit Court at Memphis, and after plea filed by defendants, the plaintiffs dismissed said suit; that defendants held the proceeds until April, 1871, a period of four years, and then in good faith paid it over to Glasier, Luko & Co., under the belief that no further proceedings would be instituted; that the defense of the first suit was made by Glasier, Luko & Co. at their own expense, and not at the instance of defendants.

p. 12 and 13.

We insists that to enforce a forfeiture and condemnation of the property, there must have been instituted and prosecuted to a final judgment a proceeding in rem against the tobacco, or its proceeds.

This is clearly shown at pages 111 and 112 of U. S. Statutes at Large, vol. 14, ch. 184, 1866.

This act, commencing at the last clause of page 111, provides: "That all goods, wares, merchandise, articles or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession or custody, or within the control of any person or persons, for the purpose of being sold or removed by such person or persons, in fraud of the internal revenue laws, or with any design to avoid payment of said taxes, may be seized by the Collector, etc., and the same shall be forfeited to the United States; and the proceedings to enforce said forfeiture shall be in the nature of a proceeding in rem, etc."

The remainder of this clause clearly prescribes a proceeding in rem., for it provides:

"That upon seizure by the Collector he shall place the property in the possession of the Marshal, who shall retain it under

the Collector's seizure until he shall obtain possession by process of law." The proviso to the same clause on p. 112, at line 27, still more clearly manifests the intention of the Legislatnre to confine the remedy for enforcing the forfeiture to a proceeding in rem. It declares: "Provided, that when the property so seized may be liable to perish, or become greatly reduced in price or value by keeping, or when it cannot be kept without great ex expense," it may be restored to the owner on his giving bond, which bond is to be filed "with the United States District Attorney for the district *in which said proceedings in rem. may be commenced.*" And provided further, "that if said bond *be given before seizure thereof, by virtue of the process aforesaid, the Marshal shall give notice of the pendency of the proceedings in Court* to the parties executing said bond, etc., and the Court shall have jurisdiction of said matter and parties in the same manner as if the property had been seized by virtue of the process aforesaid."

The foregoing provisions exclude the idea of any proceeding to determine a forfeiture and condemn the goods to the forfeiture, except by a proceeding in rem.

To enforce this forfeiture by an action of assumpsit against the defendants, (who were not the owners,) and without any notice to the real owners, Glasier, Luko & Co., would be violative of a principle very emphatically laid down by this Court, to-wit: "A sentence of a court pronounced against a party, without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor vs. McVeigh, 3 Otto, R. 274.

McVeigh vs, United States, 11 Wal., R. 267.

"There must be notice to the party to a valid judgment affecting his rights." Same.

"It is abhorrent to all reason to allow a forfeiture to be enforced on an alleged wrong *without notice and hearing, or opportunity to be heard.*"

People vs. Fire Department, 31 Mich, R. 458.

"There can be no such thing as a statutory forfeiture without a judicial sentence."

Wilkinson vs. Cook, 44 Miss. R. 367.

"There must be a seizure, and that seizure must continue."

United States vs. Rectified Spirits, 8 Blatchf. 480.

"To sustain a condemnation, or judgment of forfeiture, there must be a good subsisting seizure under the process of the court at the time when the information was filed, and that seizure must be continued either actually or constructively up to the decree or judgment of condemnation."

Ibid, 480.

The Brig Ann, 9 Cranch, 289.

The Josefa Segemun, 10 Wheat. 312.

The Sloop Abby, 1 Mason, 360.

Silver Spring, 1 Sprague, 55I.

That the proper proceedings to enforce a forfeiture of goods for a violation of the revenue laws of the United States is an information supported by a judicial seizure is shown by the fact that it is the uniform mode.

A quantity of Manufactured Tobacco. 5 Ben., R. 457.

Henderson's Distilled Spirits. 14 Wal., R. 56.

Garnhart's vs. United States. 16 Wal., R. 162.

United States vs. Bags of Coffee. 8 Cranch, R. 393.

A forfeiture under a revenue act is highly penal and should be strictly construed. The Mars. 8 Cranch, 417.

Where a statute imposes a forfeiture of goods by way of penalty, the title does not vest in Government or informer, to whom the goods are given, without a judicial proceeding declaring the forfeiture.

Fire Department vs. Kip. 10 Wend., R. 226.

The Mars. 1 Gall., R. 192.

On the second point we insist the Court erred in refusing to instruct the jury as requested in the second instruction asked by the defendant at p, 13, because, under the agreement between the Collector, Saunders, and defendants, they were to sell the tobacco and pay the proceeds into Court only when a judgment of condemnation had been procured. See at p. 12 the agreement as proved by the Government; and "that no proceedings were ever instituted for the condemnation of the tobacco." The tobacco did not belong to defendants, they were simply bailees and factors to sell.

Glasier, Luko & Co., who manufactured the tobacco at St. Louis, Mo., were the owners, and, on a proceeding to condemn, were entitled to monition or notice. The suit instituted in October, 1867, for the tobacco was abandoned and no step was taken for four years. Defendants were well warranted by this abandonment and long delay of four years in believing the Government had abandoned the claim, and that they ought to pay the money over to the proper owners.

How long should a fiduciary agent or factor be required to hold the funds of the principal? Is it not vicious in principle to afford, as the judgment in this case does, an excuse for a trustee to withhold money from the beneficiary four years?

FRAYSER, HUMES & POSTON,
Attys. for Pl'ffs in Error.

W. Y. C. HUMES & T. W. BROWN,
Attys. for Same.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

JAMES M. PETTIGREW
vs.
THE UNITED STATES. } No. 53.

ERROR TO UNITED STATES CIRCUIT COURT FOR WESTERN DISTRICT OF TENNESSEE.

DEFENDANTS' BRIEF.

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DEFENDANTS' BRIEF.

I.

The first thought occurring to me upon reading the record in this case is that it does not bring the cause within the jurisdiction of this court.

The original *ad damnum* was but $2,000 (Record, 2, bottom). The judgment was for $1,354.35 (Record, 12, middle). Its amount, then, does not entitle it to be heard here. The only clause giving the right by reason of the government being a party is the second division of section 699 of the Revised Statutes, *i. e.:* "Any final judgment of a circuit court or of any district court acting as a circuit court, in any civil action brought by the United States for the enforcement of any revenue law thereof."

The present action was brought, not to enforce any

revenue law, but to recover damages for a breach of contract. The recovery was under the count for money had and received. (Record, 13, folio 35.)

The plaintiff in error violated no revenue law; nor was the suit instituted upon the theory of any such violation by him. It is based upon the agreement of his firm to hold certain moneys for the government; and upon the contract implied by law to hold for the United States the sum received for property to which it had acquired title by forfeiture. It is wholly an action of contract. The United States stands just as any individual citizen would, and is not attempting to enforce any mere sovereign rights or statutory penalties.

II.

Briefly examining the exceptions, we find the first to be to the admission of evidence touching the guilt of the tobacco. (Record 13, middle.)

If the goods were guilty, and therefore liable to forfeiture under the revenue law, that liability was incurred so soon as the guilt attached; its existence was then the primary, essential fact to be established. (See cases cited *infra*.)

III.

The court rightly refused to charge that the failure to prosecute the tobacco to condemnation would prevent a recovery in this suit. (Record, 13.)

The property became that of the United States so soon as guilt attached to it. Belonging to the government, its agent procured a sale by the plaintiff in error for its interest and use; and he cannot be heard to complain of delay any more than if the collector had kept the goods after seizure; for his holding was that of the collector.

IV.

The dismissal of the former suit and the good faith of Edwards & Pettigrew in paying over the proceeds of sale could not bar a recovery. (Record, 13, "Second.")

The dismissal of the first suit was no bar. (Haldeman *v.* United States, 91 U. S., 584.)

Nor was the good or bad faith of the commission-merchants. If the money belonged to the United States, as representing its property, or was payable to the government by the terms of a special agreement, it is no defense to a civil suit that the defendant honestly thought a different disposition of the money proper. A *bona fide* purchaser of forfeited property acquires no title as against the government, as the cases uniformly declare. (Henderson's Spirits, 14 Wallace, 56 to 61, and citations.)

V.

The judge was right in saying that affixing counterfeit stamps forfeited the property. The statute so declared. The charge that, after it was properly seized as forfeited, a sale of it by Edwards, Pettigrew & Co., by direction of the seizing officer, and failure to pay over the proceeds would sustain the action, was also legally correct. (Record, 13, folio 35.) By the act incurring forfeiture the title passed to the United States. United States *v.* Coffee, 8 Cranch, 398; Gelston *v.* Hoyt, 3 Wheaton, 311, where it is said that "the forfeiture must be deemed to attach at the moment of the commission of the offense, and consequently, from that moment the title of the plaintiff would be completely devested," &c.

As Judge Ballard puts it, "The seizure is the *consequence* of the forfeiture, not the *cause*." United States *v.* 56 Bbls., 6 Am. Law Reg. (N. S.), 40.

The title of the United States is not created by, nor solely dependent upon, a condemnation; that judgment is only an *evidence* of governmental title. A judgment in an action of contract between individuals for a given sum does not *create* the indebtedness to that amount; it only evidences it and provides the means for its recovery. Proceedings *in rem* are proper to ascertain the facts and to purge all mesne conveyances of the property; but are not necessary to give title. The title of Glasier, Leucho & Co. having been devested by their fraud, it is no defense for Mr. Pettigrew that the proceeds of sale were paid to those who no longer had any title. (Wilkins *v.* Despard, 5 T. R., 112.) Edwards, Pettigrew & Co. were the bailees of the collector and of the government, and bound so to account.

EDWIN B. SMITH,
Assistant Attorney-General.